

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER WEAVER and AMY WEAVER,

Plaintiffs/Counter-Defendants-
Appellants,

v

TIMOTHY SUTTON, d/b/a SUTTON
CONSTRUCTION,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

March 22, 2007

No. 260282

Oakland Circuit Court

LC No. 2003-049727-CK

CHRISTOPHER WEAVER and AMY WEAVER,

Plaintiffs-Appellants,

v

TIMOTHY SUTTON d/b/a SUTTON
CONSTRUCTION,

Defendant-Appellee.

No. 260822

Oakland Circuit Court

LC No. 2003-049727-CK

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

In Docket No. 260282, plaintiffs appeal as of right from the trial court's judgment of no cause of action in favor of defendant. In Docket No. 260822, plaintiffs appeal as of right from the trial court's order granting defendant's motion for case evaluation sanctions. In both cases, we reverse.

On May 12, 2003, plaintiffs, Christopher and Amy Weaver, filed a complaint alleging breach of contract, violation of the Michigan Consumer Protection Act, and fraud against defendant, Timothy Sutton d/b/a Sutton Construction. Plaintiffs alleged that the parties entered into a contract for improvements to property, and defendant agreed to provide labor and materials for the contract. Although the parties agreed to the sum of \$82,000, a written, signed contract was not executed. Plaintiffs alleged that the work on the project had commenced in July

2001, and payments totaling \$72,000 were made to defendant. Despite the payments, it was asserted that the project was not completed as promised, and that the workmanship was poor. Although the contract purportedly had a completion date of December 1, 2001, it was not finished at that time. Consequently, plaintiffs terminated defendant on December 3, 2001, and had to retain other contractors to complete the project and make repairs to the work performed by defendant. Plaintiffs alleged that the project was not completed until December 2002, and they were unable to occupy the home from September 2001 through April 2002. It was asserted that damages were incurred as a result of the failure to complete the project timely, the improper placement of a lien on the property, and the use of other subcontractors to repair and finish the project.¹

In response, defendant answered the complaint and filed a countercomplaint. The countercomplaint alleged that there was an executed contract, but plaintiffs retained defendant's copy and destroyed it. It was asserted that plaintiffs impeded the progress of the project by making changes to the project, ordered materials on defendant's account, and attempted to have direct contact with subcontractors. Plaintiffs barred defendant from finishing the project and purportedly utilized his permit to complete it. Although plaintiffs allegedly promised to pay defendant for the work performed, they failed to do so. Consequently, defendant's countercomplaint raised claims for breach of contract, unjust enrichment, conversion, multiple fraud claims, and tortious interference with business relations.²

On September 30, 2004, the date set for trial, the court called the case and indicated that the parties had agreed to resolve the matter "informally." The trial court advised the parties that they would have been entitled to a bench or jury trial. In advising the parties of how the case would proceed, the trial court told them that formal rules of evidence and "other rules of procedure" would not apply to the informal resolution of the case. It further instructed the parties that damages could be as low as zero or as high as \$100,000. After obtaining the parties' understanding of the "agreement" on the record, the trial court asked the parties if they understood that "any appeal in this matter is unlikely." When plaintiff Amy Weaver indicated that she did not understand, the trial court advised her that it meant that she could appeal the decision, but the chances of prevailing on appeal were unlikely. The trial court then convened in the jury room where formal proofs were not recorded. Consequently, there is no record on appeal of the "informal" proceedings for this Court to review.³

¹ An amended complaint was filed which contained the same basic allegations.

² Plaintiffs filed a motion for summary disposition, alleging that summary disposition was appropriate when defendant did not respond to requests to admit. Defendant opposed the motion, alleging that there were genuine issues of material fact regarding the terms of the contract, any breach, and any repudiation. The trial court denied the motion.

³ We recognize the general rule that a party may not assent to a course of action in the trial court and then claim error on appeal. See *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 54; 698 NW2d 900 (2005). However, as set forth in this opinion, deviation from the general rule is required here where the court rules provide for resolution of a case without a jury trial, and the trial court did not select one of those options.

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Despite the fact that the trial court “informally” resolved the case, the trial court issued a lengthy written opinion in favor of defendant, stating as follows:

This matter is before the Court, by agreement of the parties, for the Court to decide same without the formality of trial. On September 30 each side agreed, on the record and in writing, for the Court to decide and resolve the case by informal discussions with them, by its review of the pleadings submitted, and by any further documentation requested by the Court. Both sides understood and agreed the rules of procedure and evidence would not apply and that the outcome could be zero (\$0.00) or in excess of \$100,000.

After reviewing the documentation and hearing both sides informally the Court observes there was little or no mutuality of contract. Plaintiff’s [sic] attorney has maintained there was a contract and a breach. However, there has been no identification as to actual terms. While there were understandings, the best of which could be said to be the Sutton Construction Bid dated May 31, 2001, the parties labored throughout most of the time with one misunderstanding after another. A major issue was whether they had agreed to a **completed project** (including all exterior and interior items, excepting flooring and painting), or a **“close to weather” addition project**. Unfortunately for Plaintiff [sic], the Bid document is the most accurate memorialization of what, if anything, had been the parties’ understanding. As it was, Plaintiff [sic] terminated Defendant some six months later, in December 2001.

In response to the Court’s request, Plaintiffs and Defendants [sic] submitted itemized statements of work purportedly done needing repair/correction and that which was done purportedly in an unworkmanlike manner. From the former list, Plaintiff [sic] claims a total sum due and owing of approximately \$18,860 for such items as plumbing, electrical, cement, carpentry, siding, window trim, soffit vents, porch, roof vents, glass blocks and interior walls and windows. As to some of these, Defendant correctly notes they were not in the Bid proposal, e.g., plumbing and electrical. As to others, the Court accepts Defendants [sic] version(s) that he had not agreed to same, that he installed them as requested, that he was discharged before completion, and/or that Plaintiff’s [sic] request amounted to change orders.

As to work poorly performed and not correctable, it appears there may be some overreaching or further misunderstandings on Plaintiff’s [sic] part as to several items, e.g., the trusses, joists, sky lights, arches, windows, drainage, crawl space and settings. Plaintiff’s [sic] case law here is unpersuasive or inapplicable. For example, *Dierickx v. Vulcan*, 10 Mich App 67 [158 NW2d 778] (1968) involved an **express** contract and guarantee/warranty by the Defendant contractor. In addition, *Co-Jo, Inc. v. Strand*, 226 Mich App 108 [572 NW2d 251] (1997)

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Rather, the option offered by the trial court precludes this Court from acting as an error correcting court because of the absence of a record on appeal.

actually ruled there is no breach of warranty that necessarily flows from an alleged, or proven, negligent performance. By working the way the parties did, without formal contracts and/or change orders, Plaintiffs left the project's performance and completion up to the professional judgment of Defendant.

This is a disappointing case because of the financial and emotional costs each side has had to bear. Plaintiff's [sic] strongest argument has been a perceived possible protection from the Michigan Consumer Protection Act, MCL 445.901 et seq [sic]. There could be, indeed, some basis for its application here, e.g., the ceiling joists, skylight and windows. However, Defendant has relied upon the exemptions provided by the Act and **Plaintiff [sic] has failed to establish** or prove why Defendant is not exempt as required by statute. MCL 445.904(4).

Unfortunately, this case represents a situation where contracts should have been employed, but were not. Plaintiff's [sic] request for a cause of action and judgment in their favor is denied.

This is a final disposition. Defendant may submit a judgment of no cause of action. [Emphasis in original.]

After the ruling, plaintiffs filed a motion for a new trial, alleging that the trial court's ruling did not comport with MCR 2.517, requiring the court to find facts and separately state its conclusions of law. The trial court denied the motion for a new trial without elaboration. Defendant filed a motion for case evaluation sanctions. Plaintiffs asserted that the case evaluation rule could not be utilized to impose sanctions because the resolution of the case did not result in a "verdict" as defined by the court rules. The trial court issued a written opinion regarding case evaluation sanctions by holding:

This matter is before the Court on Defendant's request for costs and fees pursuant to MCR 2.403(O).

On September 30, 2004 this matter was scheduled for trial. On that date the parties, through their attorneys, requested the Court to decide the case informally for the parties hereto. The Court, on the record at about 10:45 AM, reviewed with both Plaintiff [sic] and Defendant essentially the following:

1) That each of you understand you could have a trial on this matter, a bench trial or a jury trial.

2) That you've agreed instead to have the Court decide this informally, which means that the formal rules of evidence and procedure will not apply.

3) That the outcome for each of you is that you could receive nothing (\$0) or as high as \$100,000, from what the Court has reviewed in the pleadings so far.

4) Understanding these things, you are saying you want the Court to decide this informally, not formally by the bench or by a jury.

5) You understand any appeal you take in this matter is not likely to be granted.

In each of the five questions recited, Plaintiff [sic] and Defendant individually answered each question personally and affirmatively.

In addition, the parties on that date also submitted a written document signed by them indicating they agreed to have this Court informally decide their case and that the Court's ruling would be binding.

On November 12, 2004, following extensive discussions with the parties, and a number of attempts to have the parties resolve the case themselves from what had been discussed among everyone, and after having reviewed the paperwork and pleadings, this Court entered a formal opinion denying Plaintiff [sic] judgment and further stating that this was a final disposition. A judgment was formally entered December 21 granting Defendant's request for no cause of action for Plaintiff [sic] and dismissing all claims and counterclaims.

Plaintiff [sic] correctly notes the Jerico case for the proposition that only three things qualify in order for Defendant's motion to be granted:

a) a jury verdict, b) a judgment by the court after a nonjury trial and c) a judgment entered as a result of a ruling on a motion filed after mediation, Jerio [sic] Construction v. Quadrants Inc., 257 Mich App 22, 29-30 [666 NW2d 310] (2003).

From this Plaintiff [sic] argues the process used did not fall within any of the three methods clearly and unambiguously set forth in MCR 2.403(O)(2).

Overlooked by Plaintiff [sic] is the fact that on September 30 the parties placed before the Court their request, not the Court's, as to what is tantamount to a motion to have this Court decide the matter informally. As noted in MCR 2.119, "unless made during a hearing or trial, motions must generally be in writing." Here, both Plaintiff [sic] and Defendant, and their attorneys, requested the Court to resolve this matter on September 30. Subsequently, the Court took great pains to have the parties appreciate the effect of their request. Following that, the Court issued a written opinion, again at the parties request after weeks of trying to have them settle, which opinion concluded this issue could have been avoided by a properly drafted contract and that Plaintiff's [sic] complaint for breach of contract and Consumer Protection simply failed. That is, the Court found there was no cause of action based upon the issues pled by Plaintiff [sic] and a Judgment of No Cause of Action was appropriate.

Subsequently Judgment was entered on December 21, 2004.

For these reasons, as well as those stated by Defendant, Defendant's request is granted in part. Defendant shall be entitled to recover reasonable attorney fees. However, Defendant's request, at least insofar as an actual award,

is held in abeyance because, as noted by Plaintiff [sic], there was no showing of reasonableness and other proper details.

Plaintiff's [sic] request for sanctions is denied and without merit, particularly its argument regarding MCR 2.114(D)(2). [Emphasis in original.]

Plaintiffs appeal as of right from the judgment of no cause of action and the award of case evaluation sanctions. On appeal, plaintiffs' trial counsel filed an affidavit alleging the parties were deprived of the right to a bench or jury trial. It was asserted that the parties were given three options to resolve the case, none of the options involved the right to a trial, and the "informal" resolution was the option selected in light of the trial court's limitations placed on the parties. In effect, it was asserted that there was no actual consent to waive the right to trial because a trial was never an option. Because the court rules do not provide for a trial by "informal" resolution, the circuit courts are courts of record and a record was not made in this case, and the lack of a record prevents this Court from addressing the merits and deprives plaintiffs of the right to appeal, we reverse.

Review of the court rules reveals that there are ample methods for "informal" resolution of a case or resolution short of trial. MCR 2.410(A)(1) provides that all civil cases are subject to dispute resolution processes. Specifically, settlement conferences may be held, MCR 2.401, the parties may submit the matter to case evaluation and accept the evaluation assessed by a panel, MCR 2.403, and the parties may submit the case to mediation, MCR 2.411. See MCR 2.410(A)(2). However, the parties are not limited and may employ other mechanisms for resolution based on the parties' stipulation. *Id.* Therefore, the parties may submit the matter to binding arbitration, a process which limits the circumstances in which an award may be vacated. See MCR 3.602(J). Despite these options, the trial court chose to resolve the case "informally." Review of the court rules reveals that there is no provision for informal resolution of cases by the trial court in the manner it was conducted. MCR 2.509 governs the two circumstances in which a trial may be held: by jury or by court. The rule provides:

(A) By Jury. If a jury has been demanded as provided in MCR 2.508, the action or appeal must be designated in the court records as a jury action. The trial of all issues so demanded must be by jury unless

(1) the parties agree otherwise by stipulation in writing or on the record, or

(2) the court on motion or on its own initiative finds that there is no right to trial by jury of some or all of those issues.

(B) By Court. Issues for which a trial by jury has not been demanded as provided in MCR 2.508 will be tried by the court. In the absence of a demand for a jury trial of an issue as to which a jury demand might have been made of right, the court in its discretion may order a trial by jury of any or all issues.

Consequently, the parties to a lawsuit are permitted to present their case to a judge or jury. The court rule also designates how a case will proceed:

(C) Sequence of Trial. In an action in which some issues are to be tried by jury and others by the court, or in which a number of claims, cross-claims, defenses, counterclaims, or third-party claims involve a common issue, the court may determine the sequence of trial of the issues, preserving the constitutional right to trial by jury according to the basic nature of every issue for which a demand for jury trial has been made under MCR 2.508.

Thus, the court rules provide for a bench or jury trial and the manner in which trial is handled. There is no provision in the court rule for the trial judge acting as the trier of fact in a bench trial to proceed “informally” without benefit of record. Moreover, although the trial court indicated that it was proceeding informally, the ultimate resolution of the case was anything but informal. The trial court issued a two-page opinion that cited to evidence presented before the judge. However, the evidence presented was not preserved on the record, by transcript, or through exhibits.

Moreover, the statutory authority for the configuration and jurisdiction of the circuit court does not account for informal resolution of cases. MCL 600.601 provides that circuit courts have the power and jurisdiction possessed by “courts of record” at common law. MCL 600.605 provides:

Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or the statutes of this state.

MCL 600.601 and MCL 600.605 provide the process for resolution of a case. The circuit court, *a court of record*, has jurisdiction to hear and determine all civil claims. It does not provide for the trial court to hold off the record proceedings in the jury room for “informal” resolution. Moreover, MCL 600.621 provides:

The circuit courts from time to time may make rules for regulating the practice of the said courts in matters not covered by rule of the supreme court or by statute.

The court rules adopted by the Supreme Court govern the manner of holding a trial. See MCR 1.104; MCR 2.001. MCR 2.001 provides that the rules created govern the procedure to be followed in all civil proceedings. The only exception to application of the court rules arise when the limited jurisdiction of a court makes a rule inapplicable or where a different procedure is applied to a specific court. MCR 2.001. There is no provision in the court rules for the trial court to disregard the rules of procedure governing a trial.⁴

⁴ We note that plaintiffs’ trial counsel asserted that proper consent to waive a formal trial was not obtained because it was never given the option of proceeding to trial. This information is not contained within the lower court record, and we need not address it in light of our conclusion that the “informal” manner of resolving the case was improper.

Further, although the trial court stated that it was resolving the matter “informally,” the ultimate ruling was anything but informal. Rather, the trial court issued a two page written opinion that decided the case. However, because the trial court did not hold proceedings on the record, admit evidence, take testimony, and make factual findings and conclusions of law based on the evidence presented, we are unable to review the trial court’s decision. Thus, in addition to disregarding the civil rules of procedure for resolving a case, the trial court obviated the appellate process as well.

The function of the Court of Appeals is to act as an error correcting court. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002); see also *Up & Out of Poverty v Michigan*, 210 Mich App 162, 168; 533 NW2d 339 (1995) (“We are also mindful that this Court functions as a court of review that is principally charged with the duty of correcting errors.”) Appellate review is limited to the record established in the lower court, and a party may not expand the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Because of the limitations placed on appellate review, the parties have the duty to ensure that the record on appeal is complete. See *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). We do not consider any alleged evidence proffered by the parties for which there is no record support. *Id.* The trial court resolved the matter by listening to the parties and their attorneys in the jury room without the presence of a court reporter and without taking testimony or evidence.⁵ Despite this informal process, the trial court concluded the matter without making factual findings, without making credibility assessments, and without applying the factual findings to the applicable law. Accordingly, we conclude that the “informal” resolution by a circuit court, a court of record, was erroneous under the circumstances.⁶

We note that the trial court asserted that its action was proper because of the parties’ consent. When advising the parties of the right to appeal, the trial court noted that the success on appeal was unlikely. However, the trial court failed to advise the parties that the chance of success on appeal was unlikely because there would be no record for the appellate court to review. Further, while the trial court advised the parties that the rules of evidence would not apply, it advised them that “other rules of procedure” would not apply.⁷ However, the trial court

⁵ Plaintiffs also alleged that their case was supported by the testimony of the local building inspector. However, it was asserted that they were not permitted to have him “testify” or be heard informally.

⁶ Our opinion should not be construed as placing limitations on the trial court’s ability to involve itself in settlement negotiations. However, the court rules provide mechanisms for resolving a case short of trial that include case evaluation, mediation, and arbitration. If the parties select arbitration, a record is generally not preserved for appellate review and the review available is limited to circumstances that are difficult to overcome on appeal. If the parties opt to proceed to trial, the circuit court as a court of record must handle the case in accordance with the court rules and cannot decide to selectively invoke rules, particularly without apprising the parties of the particular rules that will be followed.

⁷ In the oral statement on the record, the trial court stated that “other rules of procedure” would not apply. In the written opinion addressing case evaluation sanctions, the trial court held that
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failed to delineate which rules of procedure it would abide by and which rules it would not follow. Consequently, we also reverse the case evaluation sanction award rendered by the trial court. The trial court never informed the parties that it would selectively resort back to the court rules. Therefore, the parties were never apprised that although they were bound by the “informal” decision, the post decision process would be governed by the court rules. The parties were not told that, irrespective of the final judgment, the case evaluation rule would apply.

Additionally, the “informal” resolution of the case was not governed by the case evaluation rule. MCR 2.403(O) designates that a rejecting party is liable for costs and sets forth the circumstances under which such an obligation arises:

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party’s actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

(2) For the purpose of this rule “verdict” includes:

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

The trial court awarded case evaluation sanctions without examining the applicable court rule. The resolution of this case does not satisfy the term “verdict” as set forth in the court rule. A jury did not render a verdict, and a judgment was not entered as a result of a ruling on a motion. MCR 2.403(O)(2)(a), (c). MCR 2.403(O)(2)(b) does not apply because the court did not enter a judgment following a “nonjury trial.” By the court’s own definition, a trial did not occur, rather the case was submitted for “informal” resolution, without benefit of a record. Therefore, the trial court cannot impose case evaluation sanctions when it did not apprise the parties that it would re-invoke the court rules of procedure following informal resolution and where the “informal” resolution did not satisfy the criteria for a verdict as set forth in MCR 2.403(O)(2). Consequently, we reverse and remand for proceedings before a new trial judge.

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the parties were advised that the rules of procedure would not apply. If the court rules were rendered inapplicable by the parties, it is unclear why the trial judge awarded case evaluation sanctions.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood